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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

B4
ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

JUL 14 2003

File: WAC 01 239 58005

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a company organized in the State of California in October 1996. It is engaged in the import and export of giftware, sport and fashion bags, and tourist items. It seeks to employ the beneficiary as its general manager and president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary is not a first-line supervisor and is not required to supervise professionals to qualify for this visa classification. Counsel also asserts that the nature of the petitioner's industry is irrelevant in the determination of this petition.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -
- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially stated that the beneficiary had been involved in promoting the company's business, establishing new businesses, coordinating sales, purchasing and formulating policies and designing business expansion plans. The petitioner added that the beneficiary conducted its wholesale and retail business, added giftware items to the company's product line, participated in exhibitions, built an extensive client base, and had created three departments and employed individuals to manage each department. The petitioner also stated that the beneficiary oversaw all departments and continued to make and formulate company policies and directions.

The petitioner also provided an organizational chart showing the beneficiary as president over the shipping, purchasing, and sales departments. The organizational chart showed each department with one employee. The petitioner also provided a second organizational chart showing the beneficiary's involvement as general manager of both the United States petitioner and the overseas entity. The second organizational chart depicted the beneficiary as the senior most employee at the United States office and showed a "computer man" reporting to the beneficiary and a sales clerk reporting to the "computer man."

The director requested a more detailed description of the beneficiary's duties. The director also requested the petitioner's organizational chart with the names of all executives, managers, supervisors, and employees within each department. The director requested a brief description of job duties for all employees subordinate to the beneficiary's position. The director further requested the petitioner's California Form DE-6, Quarterly Wage Reports.

In response, the petitioner provided the beneficiary's position description as follows:

Plan and direct the sales activities and promotional strategies of the U.S. subsidiary. Analyze sales statistics to formulate sales policies to promote company products. Conduct market analyses to determine customer needs, volume potential, price schedules,

discount rates, and develop sales campaigns to accommodate company goals. Direct staffing, training, and performance evaluations to develop and control sales programs.

The petitioner also provided the beneficiary's daily schedule:¹

Develop potential customers, and keep contact with existing customers via telephone (20%)

Aside from phone contacts with new and existing customers, [the beneficiary] will also contact them through e-mail (20%)

Answer enquires [sic] from customers (10%)

Arrange 10% of her daily work hours to meet and interface with customers (10%)

Instruct staff to prepare drawings, and designs; prepare production instructions in Chinese for [the] Hong Kong parent company and fax the instructions to [the] Hong Kong office (10%)

Search new product lines to stay current with the growth of the market place (10%)

After obtaining information about the current trend, [the beneficiary] will design new products accordingly (10%)

Prepare operation instructions [for the] Hong Kong office to ensure the Hong Kong office is operating collaboratively with the U.S. subsidiary (20%)

The petitioner also provided a third version of its organizational chart. This organizational chart depicted the beneficiary as general manager, a designer/production position and a manager of computer sales reporting to the beneficiary, and a sales/assistant designer and a clerk reporting to the manager of computer sales. The petitioner also provided its California Form DE-6 for the quarter ending June 30, 2001, the quarter in which the petition was filed. The California Form DE-6 showed five employees including the beneficiary. As noted by the director only two of the employees, the beneficiary and the manager of computer sales could be identified as corresponding to the first names set out on the petitioner's third organizational chart. Two other individuals on the petitioner's California Form DE-6 corresponded to the employees

¹ The AAO notes that the percentages listed for the daily schedule total 110 percent. The percentages should have totaled 100 percent. The petitioner failed to explain this anomaly.

identified as working in the shipping and sales departments on the first organizational chart submitted by the petitioner.

The director determined that, given the petitioner's type of business, it was reasonable to believe that the beneficiary would be involved with day-to-day non-supervisory duties. The director also determined that the beneficiary would be engaged as a first-line supervisor and not as an executive or manager.

On appeal, counsel asserts that the beneficiary is not a first-line supervisor. Counsel notes that the beneficiary supervises the sales and operation department and the design and production department. Counsel points out that two employees report to the senior employee in the sales and operation department. Counsel also asserts that the beneficiary is not required to supervise professionals but may supervise other supervisors or managers and still qualify for this visa classification. Counsel finally asserts that the nature of the petitioner's business is not relevant when determining a beneficiary's managerial or executive capacity.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 204.5(j)(5). The petitioner's description of the beneficiary's daily duties clearly shows that the beneficiary primarily performs sales and marketing duties for the petitioner. The beneficiary spends 60 percent of her time developing and interacting with potential and existing customers by telephone, by e-mail, or in person. The beneficiary spends another 20 percent of her time researching market trends and developing and designing products to take advantage of those trends. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The remainder of the record demonstrates that the beneficiary does not primarily perform executive or managerial duties; instead, the evidence shows that the beneficiary primarily performs the operational tasks necessary to develop, design, market, and sell the petitioner's products.

Counsel's assertion that the beneficiary is not a first-line supervisor is not persuasive. The petitioner has presented three different organizational charts. The first chart, because it was submitted at the time the petition was filed, should be the most accurate depiction of the petitioner's organizational hierarchy. The first chart shows the beneficiary as directly supervising three employees. The petitioner offers no explanation why the organizational chart submitted in response to the director's request for evidence inserts an employee between the beneficiary's position and the positions of sales/assistant designer and clerk. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to

explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). The inconsistencies in the record suggest that the beneficiary is only a first-line supervisor of non-managerial, non-supervisory, and non-professional employees. On appeal, counsel has offered no explanations regarding these inconsistencies and has not provided evidence that the beneficiary's duties primarily involve the supervision of supervisory employees. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel's assertion that the beneficiary is not required to supervise professionals to qualify for this visa classification is correct. However, as stated above, the petitioner provided inconsistent evidence; therefore, the petitioner failed to substantiate that the beneficiary oversees supervisory employees.

Counsel's assertion that the nature of the petitioner's business is irrelevant when determining the executive or managerial capacity of the beneficiary is incorrect. The director must review all the evidence in the record, including the nature of the petitioner's business. If the director bases her decision on the size of the petitioner, the director must also consider the reasonable needs of the petitioner. In this case, the director simply noted the petitioner's type of business and determined that it was reasonable to believe that the beneficiary would be involved in the day-to-day non-supervisory duties of the petitioner. The director's determination is substantiated by the petitioner's own description of the beneficiary's duties. As stated previously, the description of the beneficiary's duties and the time allocated to those duties indicate that the beneficiary is primarily performing the necessary operational tasks of the petitioner.

In sum, the petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive duties.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.